WEB COPY NOT OFFICIAL

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15293 of 2007

==========

Pawan Kumar Verma son of late Nawal Kishore Sahay, presently residing at Bhikhanpur, Gumti No. 1, P.S. Ishakchak, District Bhagalpur,

.... Petitioner

Versus

1. The State Of Bihar,
2. D.D.C.-cum-Chief Executive Officer, District Board, Bhagalpur,
3. Bhagalpur Zila Parishad, through Chief Executive Officer, Zila Parishad, Bhagalpur,

.... Respondents

==========

Appearance :
For the Petitioner : M/s Sri Nandan Pd. Singh,
Ashok Kumar I, Manish Kumar,
Surendra Pd. Singh, Advocates
For the Zila Parishad : Mr. Nikesh Kumar, Advocate

==========

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
ORAL ORDER

8 22-11-2013 I have heard the parties.

Petitioner seeks quashing of the order dated 10.12.2004 (Annexure 4) passed by the District Development Commissioner-Chief Executive Officer, District Board, Patna, i.e., respondent no. 2, by which his first time bound promotion granted on 12th of August, 1987 has been cancelled on the ground that at that point of time he could not pass the departmental accounts Test which was required as per the guidelines and Rule 157(3) of the Board Miscellaneous Rules. It has further been ordered that excess amount of payment made to him view of the aforesaid first time promotion should also be recovered.

However, learned counsel for the petitioner, at the time of

hearing, confines his relief for a direction that the order of recovery should not have been passed after about 17 years from the date of grant of such promotion. Learned counsel has placed reliance upon an unreported decision dated 05.08.2013 passed by the Hon'ble Supreme Court of India in **Kusheshwar Nath Pandey v. State of Bihar and others (Special Leave to Appeal (Civil) No. 4037 of 2013).** It is contended that, considering the identical circumstance, the Apex Court has set aside the decision dated 19.09.2012 rendered by a Division Bench of this Court reversing the decision of a Single Judge of this Court passed in C.W.J.C. No. 4369 of 2010. It is submitted that in that case time bound promotion was given eleven years earlier and thereafter, the authorities of the Bihar Government woke up and held that the time bound promotion was wrongly given at that point of time in violation of the relevant Rules, however, the Apex Court after noticing the earlier decisions rendered in **Bihar State Electricity Board and another v. Bijay Bhadur and another [(2000) 10 Supreme Court Cases, 99]** and **Purusshottam Lal Das and others v. State of Bihar and others [(2006) 11 Supreme Court Cases, 492]** has held that the appellant was not at fault in any way for grant of promotion as there was no fraud or misrepresentation on his part, thus, the approach of the State Government was totally

unjustified.

Per contra, learned counsel for the respondent-Zila Parishad, Bhagalpur, has placed reliance upon the decision rendered by a Division Bench of this Court in **Bihar State Electricity Board and others v. Man Bahadur and others (2004(3) Patna Law Journal Reports, 3)** holding that the recovery of excess payment made due to wrong calculation cannot be resisted on the ground that there has been no fraud and misrepresentation by the employee. The aforesaid judgment was upheld by a decision of the Full Bench in **Ram Binod Singh and others v. The Bihar Electricity Board and others (2007(3) Patna Law Journal Reports, 399).**

Learned counsel next places reliance upon a recent decision of the Apex Court rendered in **Chandi Prasad Uniyal and others v. State of Uttarakahand and others [(2012) 8 Supreme Court Cases, 417]**. It is submitted that in the aforesaid case also the Apex Court has held that it has never laid down the principle of law that only, if there is misrepresentation or fraud on the part of the recipients of money in getting excess pay, the amount of wrong fixation can be recovered as most of the cases were tested on peculiar facts and circumstances of those cases only.

It is true that the Apex Court has observed in the aforesaid

case that the excess payment of public money, which is often described as "taxpayers' money", belongs neither to the officers who have effected overpayment nor to the recipients, thus, the concept of fraud or misrepresentation should not be brought in such situation. The question to be asked in such case would be whether the excess money has been paid or not even due to a *bona fide* mistake. It has further been observed that the effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion and favourtism etc. but undoubtedly such money does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. However, considering several earlier decisions rendered by the Supreme Court, a view has been taken by the Apex Court as follows:-

> "15. We are, therefore, of the considered view that except few instances pointed out by Syed Abul Qadir v. State of Bihar [(2009) 1 Supreme Court Cases, 744] and Col. B.J. Akkara v. Government of India [(2006) 11 Supreme Court Cases, 709], the excess payment made due to wrong/irregular pay fixation can always be recovered."

In the present case, the issue of wrong fixation of pay and excess amount having been paid due to that wrong fixation of

scale is not in question. The scheme of time bound promotion has been adopted by the State Government to address the issue of stagnancy in promotion. It is admitted position that such time bound promotion was granted to the petitioner on 12.08.1987 itself. However, after much delay, i.e., after about 17 years, it could be found out by the authorities of the State Government that the time bound promotion was wrongly given as the petitioner could not pass the Departmental Examination of Accounts.

Otherwise also, it is admitted position that the petitioner has retired from the post of Head Clerk, which was admittedly a post of promotion. The question would arise that when he could not pass the Departmental Accounts Examination, then how such promotion was given to him if he was not eligible to be given even time bound promotion.

A counter affidavit has been filed on behalf of the respondent-Zila Parishad, Bhagalpur. No averment has been made that the petitioner got the aforesaid time bound promotion on misrepresentation or committing fraud. The Apex Court in **Chandi Prasad Uniyal and others (supra)** has held that except a few instances pointed out in **Syed Abul Qadir (supra)** and **Col. B.J. Akkara (supra),** each payment made can be recovered. The relevant passage from **Col. B.J. Akkara's case(supra)** has been

quoted in the aforesaid decision of the Apex Court, however, the same is being reproduced for better appreciation as under:-

> "28. Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant , particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him. Relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

In the aforesaid case, it has been held that restrainment of recovery of back of excess payment is granted by courts not because of any right in the employees but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if just recovery is implemented. It has been observed that a government servant, particularly one in the lower

rungs of service, would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it therefore, any subsequent action to recover the excess payment will definitely cause undue hardship to him. However, when the employee had knowledge that the payment received was in excess of what was due or wrongly paid or where the error is detected or corrected within a short time of wrong payment, courts would refrain from granting relief against recovery.

In the present case, the counter affidavit filed on behalf of the respondent-Zila Parishad nowhere expresses that the petitioner was having knowledge of the fact that he was getting excess payment or had recovered the amount on misrepresentation or fraud etc. This is also a admitted that error was not detected or tried to be corrected within a short time of wrong payment rather the concerned authority woke up after 17 years and the petitioner being a Class III employee was undoubtedly in lower rungs of service. Thus, in my considered opinion, this case would be covered under the exceptions pointed out in paragraph 15 of the decision of Apex Court in **Chandi Prasad Uniyal and others (supra)** as well as observation recorded in **Syed Abul Qadir** and **Col. B.J. Akkara (supra)** and the unreported decision of the

Supreme Court rendered in **Kusheshwar Nath Pandey(supra).**

At this juncture, learned counsel for the respondents pointed out that in **Kusheshwar Nath Pandey(supra)** the employee had subsequently passed the Accounts Examination but the petitioner could not pass the same in his entire service and he has already retired on 31.03.2011 and, subsequently, the excess amount has already been recovered.

Therefore, since the petitioner could not pass the concerned examination, this Court would not be inclined to quash that party of the Annexure 4 by which his first time bound promotion has been cancelled., however, this Court is inclined to grant relief to the petitioner with respect to the recovery which has been made after 17 years of regular payment by the authorities. Otherwise also, it is admitted position that the petitioner has retired from the post of Head Clerk, i.e., from the post of promotion. Question would arise that when he could not pass the Departmental Accounts Examination then how could such promotion be granted to him if he was not eligible to be given even a time bound promotion.

In view of the aforesaid discussion, this writ application succeeds in part. The part of the order dated 10.12.2004 as contained in Annexure 4 by which recovery of excess payment has

been ordered, is quashed and set aside. If the amount has already been recovered, that should be returned back to the petitioner within a period of three months from the date of receipt/production of a copy of this order.

NOT OFFICIAL

(Dr. Ravi Ranjan, J)

SC/-